Before Lord Osborne, Lord Hamilton, Lord Carloway. Extra Div. Inner House Court of Session. 11 April 2003

OPINION : LORD HAMILTON

[1] In December 1999 the pursuer and respondent ("the Contractor") entered into a contract with the defender and reclaimer ("the Employer") for the design, construction and maintenance of the Small Isles and Inverie Ferry Scheme, Phase I. The contract included, among other provisions, conditions based on the ICE Conditions of Contract, Fifth Edition, 1973 (as revised in January 1979) subject to amendments and additions agreed between these parties. The Engineer under the contract was the Employer's Director of Roads & Transport. The contract was a *"construction contract"* within the meaning of Part II of the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act"). The contract contained various provisions designed to give effect to that statute.

[2] In April 2002 the Contractor submitted to the Engineer an Interim Application for Payment (No. 21) in respect of the period ending 3 April 2002. It sought certification of a sum in excess of f5.5 million as due by the Employer to the Contractor. The Engineer responded by letter dated 2 May 2002 in which he stated in effect that in his opinion no sum fell to be certified by him as due under Application No. 21. A dispute then arose between the parties in respect of that matter. The Contractor referred that dispute to adjudication and in due course Mr John Hounslow was appointed as Adjudicator. In terms of a *"Notice of Adjudication"* given by it on 15 May the Contractor requested the Adjudicator:

"3.1 To open up, examine and review Interim Application for Payment No. 21 to period ending 3 April 2002 to find an amount payable to the Referring Party [the Contractor] of £5,505,972.57 or such other amount as the Adjudicator may determine.

3.2 To order payment by the Responding Party [the Employer] within seven days of the date of the Adjudicator's decision in the sum of £5,505,972.57 or such other amount as the Adjudicator may determine.

The Employer raised certain matters in response. On 28 June 2002 the Adjudicator issued his decision on the referral. It was, in so far as material, in the following terms:

"1. I find an amount of £245,469.24 payable by the Highland Council to The Construction Centre Group Limited.

2. The sum in 1. above shall be paid within seven days of the date of this Decision.

The Employer did not within seven days pay to the Contractor the sum which the Adjudicator had decided should be paid. Thereafter the Contractor raised, as a commercial action, the present proceedings in which it concludes for payment to it by the Employer of that sum together with interest thereon from the date of citation. The Employer lodged defences to the action, which included a contention that as at 3 July 2002 the sum of £420,000 was due under the contract by the Contractor to the Employer as liquidated damages for delay in completion of the Works. The Contractor thereafter enrolled a motion for summary decree. At a preliminary hearing the Lord Ordinary continued that motion to a fixed diet of 14 August 2002, appointing parties meantime to lodge Notes of Argument and Lists of Authorities. No order was made for adjustment of the pleadings. Having heard parties in argument at the fixed diet, the Lord Ordinary made avizandum. On 23 August he granted the Contractor's motion for summary decree as sought.

[3] The Employer marked a reclaiming motion against that interlocutor. Grounds of appeal were lodged. Shortly before the hearing of the reclaiming motion the Employer tendered proposed amended grounds of appeal. These reiterated the existing grounds but added to them grounds based on events which had occurred since the pronouncement of the Lord Ordinary's interlocutor. One of these events was that on 27 November 2002 a receiver had been appointed to the Contractor. It is unnecessary to discuss that event in detail since it was accepted before us that its occurrence could not of itself found any basis for interfering with the Lord Ordinary's interlocutor. The other additional proposed ground of appeal was in the following terms:

"6. In respect that by letters dated 7 and 15 October 2002 the Defender determined the Pursuer's employment in accordance with Clause 63 of the Conditions of Contract, the Reclaiming Motion ought to be granted and the Lord Ordinary's interlocutor dated 23 August 2002 set aside. Clause 63(4) of the Conditions of Contract provides that if the Employer enters and expels the Contractor from Site he shall not be liable to pay to the Contractor any money on account of the Contract until the expiration of the Period of Maintenance and thereafter until the costs of completion damages for delay in completion (if any) and all other expenses incurred

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by the Employer have been ascertained and the amount thereof certified by the Engineer. The Period of Maintenance has not yet begun and therefore the Defender is not liable to pay any further money on account to the Pursuer pending expiration of the Period of Maintenance and thereafter the ascertainment of the costs of completion and all other expenses".

[4] At the outset of the reclaiming motion Mr Keen for the Employer moved the court to allow the existing grounds of appeal to be amended to include those based on these recent events and to remit the cause to the Lord Ordinary to reconsider the issue of summary decree in the light of them. He also intimated that, so far as concerned the existing grounds of appeal, the Employer would be insisting only on a limited aspect of one of these grounds. Mr MacKenzie for the Contractor did not oppose the motion to amend the grounds of appeal but intimated that he would oppose any remit to the Lord Ordinary since, even if the Contractor's employment had in October 2002 been validly determined by the Employer (which was disputed), summary decree as granted by the Lord Ordinary remained, he contended, the appropriate disposal. The court allowed the grounds of appeal to be amended as proposed and thereafter heard parties on the outstanding issues.

[5] It is convenient at this point to notice the material contractual provisions. The contract is to be interpreted in accordance with Scots Law (Clause 67). Clause 66(1) provides that Disputes are to be resolved in accordance with the provisions of that Clause and Annex 3 to the Conditions of Contract. It also provides certain definitions, in particular:

"(b) 'Dispute' means a difference or dispute of whatever nature between the Employer and the Contractor arising out of or concerning the Contract:

(c) 'Disputes Resolution Procedure' means the procedure set out in this
Clause 66 and Annex 3 to Conditions of Contract".

Clause 66(2) provides: *"Where any Dispute shall arise between the Employer and the Contractor concerning the Contract, either the Employer or the Contractor may give notice in writing at any time to the other to refer the Dispute to the Disputes Resolution Procedure as set out in this Clause 66 and Annex 3 to Conditions of Contract. Either the Employer or the Contractor may then refer such Dispute to the said Disputes Resolution Procedure.*
For the purposes of this Clause the Dispute shall be that stated in the Notice of Dispute. For the purposes of all matters arising concerning the Contract the word "dispute" shall be construed accordingly and shall include any difference".

Clause 66(4) provides:
"The Employer and the Contractor shall give effect forthwith to every decision of:
(i) the Engineer on any matter arising concerning the Contract;
(ii) the Adjudicator on a Dispute given under this Clause 66
unless and until the decision is revised by agreement of the Employer and the Contractor or pursuant to this Clause 66 and Annex 3 to Conditions of Contract".

Clause 66(6) provides:

"(i) If a Dispute shall arise, whether before or after the commencement of the Designs and the Works and whether before or after repudiation or other termination of the Contract or of the Contractor's employment under the Contract, the Dispute shall be referred and decided in the first instance by the Adjudicator acting as independent adjudicator but not as arbiter.

(ii) Any decision of the Adjudicator shall be final and binding upon the Employer and the Contractor unless and until there is an amicable settlement in accordance with paragraph 2 of Annex 3, to Conditions of Contract or unless and until the Dispute has been referred to arbitration as hereinafter and an arbitral award has been made or a settlement reached between the Employer and the Contractor.

(iv) Unless the Contract has already been determined or terminated the Contractor shall in every case continue to proceed with the Designs and the Works with all due diligence regardless of the nature of the Dispute and the Employer and the Contractor shall give effect forthwith to every decision of the Adjudicator except and to the extent that the same shall have been revised by a settlement reached between the Employer and the Contractor or an arbitral award".

[6] Annex 3 (headed *"Disputes Resolution Procedure")* addresses Adjudication Procedure (paragraph 1), Amicable Settlement (paragraph 2) and Arbitration (paragraph 3). Paragraph 1, in so far as material, provides:-

"1.1 Subject to Clause 66 the Employer and the Contractor may give notice to each other in writing to refer a Dispute to adjudication at any time. Such notice shall specify the difference or matter in dispute and shall set out the principal facts and arguments relating to it which shall include inter alia:
(i) a concise summary of the nature and background of the Dispute and
the issues arising;
(ii) a statement of the relief claimed;

1.2 The Adjudicator shall have power to open up, review and revise any decision, opinion, instruction, direction, notice (with the exception of statutory notices) objection or certificate of any person given or made pursuant to this Contract, relating in any way to the Dispute save as otherwise expressly provided within this Contract".

[Further provision is then made for adjudication procedure, including a requirement that the Adjudicator reach a decision in writing within a prescribed period].

"1.10 The Adjudicator's decision shall be binding until the Dispute is finally determined by legal proceedings, by agreement or by arbitration as provided in paragraph 3 (Arbitration) of this Annex 3 to Conditions of Contract".

Paragraph 3, in so far as material, provides:

"3.1 Where the Adjudicator's decision pursuant to paragraph 1 of this Annex 3 to Conditions of Contract is not accepted by either the Employer or the Contractor ... either the Employer or the Contractor may serve a notice in writing on the other to refer the Dispute to the arbitration of a single arbiter

3.2 Any such reference to arbitration shall be deemed to be a submission to arbitration within the meaning of the Arbitration (Scotland) Act 1894 ... Such arbiter shall have full power to open up review and revise any decision opinion instruction direction certificate or valuation of the Engineer ... The award of the arbiter shall be final and binding on the Employer and the Contractor. Save as provided in paragraph 2 of this Annex 3 to Conditions of Contract no steps shall be taken in the reference to the arbiter until after completion or alleged completion of the Works unless with the written consent of the Employer and the Contractor ...".

[7] Clause 60 provides for the submission by the Contractor to the Engineer of statements at monthly intervals of, among other things, the estimated amount to which the Contractor considers himself for the time being entitled and the certifying by the Engineer of the amount (if any) which in his opinion on the basis of each such statement is due to the Contractor. Clause 60(2) provides for payment by the Employer to the Contractor within 28 days of sums so certified. Clause 60(3) makes equivalent provision in relation to a final certification. Clause 60(9) provides: *"Where a payment under Clause 60(2) or (3) is to differ from that certified or the Employer is to withhold payment after the final date for payment of a sum due under the Contract the Employer shall notify the Contractor in writing not less than one day before the final date for payment specifying the amount proposed to be withheld and the ground for withholding payment or if there is more than one ground each ground and the amount attributable to it".*

[8] Clause 47 provides for liquidated damages for delayed completion. Clause 47(4) provides: *"If the Engineer ... shall have notified the Employer and the Contractor that he is of the opinion that the Contractor is not entitled to any or any further extension of time the Employer may deduct and retain from any sum otherwise payable by the Employer to the Contractor hereunder the amount which in the event that the Engineer's said opinion should not be subsequently revised would be the amount of the liquidated damages payable by the Contractor under this Clause."*

Clause 47(5) provides for the reimbursement of the Contractor in certain circumstances of any sums so deducted and retained.

[9] Clause 63(1) provides that in certain defined circumstances of default *" ... the Employer may after giving 7 days' notice in writing to the Contractor specifying the default enter upon the said Site and the Works and expel the Contractor therefrom without thereby avoiding the Contract or releasing the Contractor from any of his obligations or liabilities under the Contract or affecting the rights and powers conferred on the Employer or the Engineer by the Contract ...".*

Clause 63(4) provides: *"If the Employer enters and expels the Contractor under this Clause he shall not be liable to pay to the Contractor any money on account of the Contract until the expiration of the Period of Maintenance and thereafter until the costs of completion damages for delay in completion (if any) and all other expenses incurred by the Employer have been ascertained and the amount thereof certified by the Engineer. The Contractor shall then be entitled to receive only such sum or sums (if any) as the Engineer may certify would have been due to him upon due completion by him after deducting the said amount*

Clause *63(5)* makes provision for valuation by the Engineer at the date of any such determination.

[10] Mr Keen in support of his motion that, in light of more recent events, there should be a remit to the Lord Ordinary submitted that the obligation under Clause *66(4)* of the Conditions of Contract to "give effect to" every decision of the Adjudicator could be equiparated with the obligation under the same clause to give effect to every decision of the Engineer on any matter arising under the Contract. Similarly, there was an equivalent relationship between certification by the Engineer of an amount due by the Employer to the Contractor and a decision by the Adjudicator under the Adjudication Procedure that the Employer should pay a sum to the Contractor. It was clear that a sum certified by the Engineer was "money on account of the Contract" within the meaning of Clause *63(4)* so that, in the event of a determination by the Employer of the Contractor's employment, the obligation to pay was suspended. It was eminently arguable that the same was so in respect of a decision by the Adjudicator that the Employer make a money payment to the Contractor. Although the Adjudicator's decision was provisional in nature, it was one which required to be reached on the basis of the Adjudicator's perception of what was contractually due.

[11] With regard to the existing grounds of appeal, Mr Keen sought to criticise the Lord Ordinary only in one limited respect, namely, his treatment of the Employer's eighth-plea-in-law, which is in the following terms: *"The defender, being entitled to exercise its right to compensation in terms of the Compensation Act 1592, is entitled to withhold payment from the pursuer of the sum sued for"*.

The Lord Ordinary, it was argued, had not properly distinguished between a plea of retention (which the Employer had also tabled) and a plea of compensation. The two were distinct (**A v. B**, since reported at *2003* SLT *242)* and in the present context operated differently. Reference was also made to ***Redpath Dorman Long Limited v. Cummings Engine Co**. 1981 S.C. 370.* While it was not disputed in this reclaiming motion that the Lord Ordinary had been entitled to hold that the

Employer had no maintainable defence to the action based on retention (the Employer not having raised that contention before the Adjudicator), it had such a defence based on compensation. The latter plea was not a matter which could be operated by the Adjudicator, any more than it could have been by an arbiter; it was a matter for the courts alone. Reference was made to the terms of the 1592 Act *("all Jugis within this realme*") and to ***McEwan v. Middleton*** (1866) 5 Macph. 159, especially per Lord Justice-Clerk Inglis at page 163, the effect of which was noted in *Erskine - Institute* (Nicholson's Edition) at page 1169, note (c). The provisions of the 1996 Act did not exclude the right of a party sued in a Scottish court to plead compensation under the 1592 Act in respect of a liquid debt, albeit one arising under the same contract, in defence to an action by the other party to enforce by court action an order by an adjudicator that a sum of money be immediately paid. A liquid debt was in this case owed by the Contractor to the Employer in the form of liquidated damages for delay in completion. As the Employer had pled in its defences to the action and was not denied by the Contractor in its pleadings, the extended date for the completion of the works (14 December 2001) had passed without completion. As at 3 July 2002, when the Employer had intimated its intention not to pay the sum ordered by the Adjudicator, the sum due as liquidated damages at the contractually agreed rate exceeded the amount which the Adjudicator had ordered the Employer to pay. Reference was also made to ***Parsons Plastics (Research and Development) Limited v. Purac Limited*** [2002] EWCA Civ 459, especially per Pill L.J. at paras. 15-16 where, albeit as a matter of interpretation of contractual terms, the Court of Appeal had reached a similar conclusion.

[12] In response Mr MacKenzie for the Contractor submitted that the Employer's motion for a remit to the Lord Ordinary should be refused on the ground that the new matters, even if established, could not constitute a defence to this action. The reclaiming motion, in so far as insisted in, should also be refused. He referred to the Notes of Argument lodged on behalf of parties in furtherance of the Lord Ordinary's interlocutor of 9 August 2002. That lodged on behalf of the Employer made no reference to compensation

and the argument now presented had not been advanced before the Lord Ordinary in the discussion on the motion for summary decree. In any event, it was unfounded. The Contractor, as had been made plain before the Lord Ordinary, disputed on a number of grounds the validity of the Employer's claim for liquidated damages; but, even if the Employer could demonstrate that on that basis a liquid debt was owed by the Contractor, that would not in the circumstances constitute a defence to this action, which was for enforcement of an order for payment made by the Adjudicator. It was important to bear in mind (1) that adjudication was a creation of the 1996 Act with which parties to a construction contract were obliged to comply, (2) that adjudication was a dispute resolution procedure, (3) that that procedure was available to parties at any time (1996 Act, Section 108(2)(a)), (4) that an adjudicator's decision was binding on the parties, (5) that it was so binding until the dispute was finally determined by litigation, arbitration or agreement (section 108(3)) and (6) that an adjudicator's order must be enforceable by court process. Reference was made to A v. B, Lord Drummond Young's analysis at paragraphs [7]-[11]being adopted. As a dispute resolution procedure, adjudication was not simply a process of ascertainment of sums due under the contract (such as was certification by the Engineer) but involved a judgement, albeit provisional, on parties' disputed contentions. It was a quasi-judicial process. The scope of the dispute was what was the subject matter of the notice of referral. Reference was made to **KNS Industrial Services (Birmingham) Limited v. Sindall Limited** [2001] Construction Law Journal 170, especially per Judge Humphrey Lloyd Q.C. at pages 179 and 182. In the present case the Contractor had by his notice of referral requested the Adjudicator not only to determine the amount payable in respect of Application no. 21 but also to order payment by the Employer of the amount so determined. If the Adjudicator had been presented by the Employer with a liquid contra-debt owed by the Contractor to the Employer - at least if it arose under the same contract - the Adjudicator would have been entitled and bound to give effect to it in extinction or reduction of any amount determined by him to be due by the Employer to the Contractor in respect of Application no. 21. The Employer had chosen not to put before the Adjudicator its claim for payment to it by the Contractor of any sum as liquidated damages for delay in completion. It would defeat the purpose of adjudication if the court were to entertain that claim in this process. The policy of the 1996 Act (that there be a swift mechanism by which a dispute under a construction contract could be resolved on a binding but interim basis) had been correctly identified by Judge Richard Seymour, Q.C. in **Rainford House Limited v. Cadogan** [2001] BLR 416 in a passage quoted by Lord Macfadyen in **S.I. Timber Systems Limited v. Carillion Construction Limited** 2002 SLT 997 at paragraph [28]. So far as concerned the Employer's argument based on Clause 63(4), an order by the Adjudicator that the Employer pay money to the Contractor was, as a matter of interpretation of the contract in the context of the 1996 Act, not a liability to pay money *"on account of the Contract"*. That clause was concerned essentially with sums certified by the Engineer. If the Clause could not be so interpreted, then it fell to be struck down as offending the statutory provisions. Reference was made to **Ferson Contractors Limited v. Levolux A.T. Limited** [2002] E.W.C.A. Civ. 11, especially per Mantell L.J. at paragraphs [26][30] and to **A. v. B.,** per Lord Drummond Young at paragraph [111.

[13] We deal first with the Employer's submission based on events since the case was before the Lord Ordinary. There are circumstances in which, in the light of events which have occurred while a reclaiming motion is in dependence, the Inner House may make an order, the effect of which is to remit to the Lord Ordinary to consider the consequences of such events. Where the new matter raises factual issues, the ordinary course is for the interested party to tender a proposed minute of amendment of the pleadings. No such minute was tendered by the Employer in this case; but the nature of the relevant supervening event is sufficiently clear from the amended grounds of appeal and we are prepared to consider the relative arguments in the absence of such a minute. However, in a case of this kind, the Inner House, before making any such remit, would require to be satisfied that there was a real prospect that the adoption of such procedure would result in a different practical outcome. In the present case we would require to be satisfied that, by reason of the Employer having taken steps in October *2002* to determine the Contractor's employment under the contract, there was a real prospect that the Lord Ordinary would take the view that the granting of summary decree was no longer appropriate.

[14] The parties' contract is a construction contract within the meaning of the *1996* Act and its terms were designed to give effect to the statutory requirements. As the Lord Ordinary observed in the present case

(paragraph [81 of his Opinion and the authorities there referred to) it is well settled that the purpose of the Act was to secure that every construction contract contained provisions which enabled the parties to the contract to obtain from an adjudicator, in respect of any dispute arising under the contract, a speedy decision which was binding and enforceable but at the same time merely provisional pending final determination by litigation, arbitration or agreement. Courts of law must interpret construction contracts consistently with that objective and lend their assistance to the prompt enforcement of decisions made by adjudicators within the scope of their jurisdiction. It is against that background that Clause *63(4)* must be construed and applied.

[15] Clause *60* provides for payment under the contract. It adopts the familiar arrangement in building contracts of the submission by the contractor at defined intervals of applications for payment and thereafter certification by the appropriate professional (here the Engineer) in respect of each such application of the amount (if any) which, in the professional's opinion, is then contractually due. The Employer is obliged within a defined period to make payment of any amount so certified. The process of interim application and certification may proceed until the stage when a final account is submitted. Although the expression "money on account of the Contract" as used in Clause *63(4)* is not, it seems, defined, it has ample content in sums which under Clause *60* may come to be (or possibly may already have been) certified by the Engineer as due but which have not yet been paid. Such certificates proceed upon the contractual mechanism for assessment of sums due from time to time thereunder. They do not constitute the resolution of any pre-existing dispute between the Contractor and the Employer. A party dissatisfied with one or more certificates may resort to arbitration; but at least under this contract (Annex *3* paragraph *3.2)* no steps can, unless with the written consent of the Employer and the Contractor, be taken in any arbitral reference until after completion or alleged completion of the Works. An arbiter's decision will be a final determination of the amount (if any) due. By contrast, the Adjudicator's decision is provisional in character; it is also a practical resolution of an existing dispute between the parties. That resolution is arrived at against the circumstances subsisting at the time of the adjudication and the submissions then made to the Adjudicator by the parties. His decision is intended to have immediate enforceable effect. As Mantell L.J. observed in ***Ferson Contractors Limited v. Levolux A. T. Limited*** at paragraph *30,* the contract must be construed so as to give effect to the intention of Parliament rather than to defeat it. To construe Clause *63(4)* as embracing sums ordered by the Adjudicator to be paid (or in any event sums so ordered prior to any determination of the Contractor's employment) would, in our view, clearly defeat the parties' contractual intention, ascertained as it must be against the relative statutory background.

[16] As regards the existing grounds of appeal these were insisted in only in so far as they related to the Employer's eighth plea-in-law. It is clear, both from the terms of the Note of Argument lodged by the Employer in advance of the hearing before the Lord Ordinary and from the Lord Ordinary's discussion of the arguments advanced to him, that no separate point, based on compensation as distinct from retention, was taken in the Outer House by counsel (who was not Mr. Keen) then appearing for the Employer. In our view counsel then appearing was right in the circumstances of this case to take no such separate point. Leaving aside an argument relative to the purported issue of a notice to withhold payment as envisaged under section 111 of the 1996 Act (an argument not pressed in the reclaiming motion), the essential issue before the Lord Ordinary on this aspect of the case was whether the Employer could, by laying before the Adjudicator its contention in relation to liquidated damages for delay, have effectually resisted an order for payment being made by him against it. While there was some discussion before us as to the scope of the Dispute with which the Adjudicator was, or might have been, seized, it was not argued that the Lord Ordinary was wrong to hold that the Employer could, if it had seen fit, have relied before the Adjudicator on a claim of retention founded on an illiquid debt arising out of the same contract, such as its claim in respect of liquidated damages for delay (if that is to be classified as an illiquid debt); and, by so doing, have resisted the making of an order for payment against it. Even as calculated at the date of the Notice of Adjudication the Employer's liquidated damages claim exceeded in amount the sum subsequently found by the Adjudicator to be due to the Contractor. If that be so, then e fortiori it could, in our view, have relied to the same effect on a liquid debt arising on the same basis under the same contract. That was a claim which, if advanced, the Adjudicator would similarly have had to entertain when he decided

whether or not to make an order for payment. It is unnecessary for present purposes to decide whether the invoking in defence before an adjudicator of a liquid debt arising under the same contract should properly be classified as retention or as compensation - the latter, ordinarily at least, describes a mechanism by which liquid debts arising otherwise than under the same contract are set against a liquid or liquidated claim. Nor is it necessary to decide whether a liquid debt arising from some other source could competently and effectually have been relied on before the Adjudicator. It is sufficient to hold, as we do, that, the contra-debt for liquidated damages for delay, whether illiquid or liquid in character, not having been relied on, as it might have been, before the Adjudicator, the Employer cannot, consistently with its contractual obligations to give effect forthwith to the Adjudicator's award, now plead compensation in this action on the basis of that contra-debt. To allow it would be to fail to recognise, first, the nature of the Adjudicator's order as being a resolution, albeit provisional, of a dispute between the parties and, second, the nature of the present action as being an enforcement mechanism for that order rather than proceedings concerned with any underlying question of the true and ultimate indebtedness (if any) of the Employer to the Contractor. We are not persuaded that the decision of the Court of Appeal in **Parsons Plastics** compels a different result. That decision, which is not binding on us, turned on contractual provisions which were not subject to the 1996 Act and on English concepts of set off which are not identical to equivalent concepts in Scots Law. Moreover, the decision of the adjudicator in Parsons Plastics was final (clause 27(h)(i) of that contract applied), not as here provisional, and he appears to have held, in the particular contractual context, that he had no jurisdiction to decide the issues arising out of the respondents' letter of 11 January 2001 (see Pill L.J. at para. 6) - these being the basis, it seems, on which the court subsequently sustained the clauses of set off. In Scotland a party who has allowed judicial decree to pass against it when it might have put forward a plea of compensation, must pay upon the decree. Similarly, the Employer having allowed the Adjudicator's order to pass against it when it might have pled an admissible contra-debt in answer, is, by virtue of its contractual obligation to give effect forthwith to that decision, precluded from pleading in the judicial action of enforcement compensation on the basis of that contra-debt.

[17] We shall accordingly refuse the Employer's motion to remit to the Lord Ordinary. We shall also refuse the reclaiming motion.

Act: Mackenzie, Solicitor Advocate; Masons (Pursuers and Respondents)
Alt: Keen, Q.C.; Dundas & Wilson (Defenders and Reclaimers)